


**STATE OF CALIFORNIA
BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION**

In the Matter of the Appeal by

Case No. 98-H-0061


Information Systems Technician
To Set Aside Resignation
7137 Clearbrook Way
Sacramento, CA 95823

Represented by:
In Pro Per

Respondent:
California State Lottery Commission
Personnel Office
600 North 10th Street
Sacramento, CA 95814

Represented by:
Leslie A. Burgermyer, Attorney
Legal Office
California State Lottery Commission
600 North 10th Street
Sacramento, CA 95814

DECISION

The attached Proposed Decision of the Hearing Officer is hereby adopted as the Department's Decision in the above matter.

IT IS SO ORDERED:

June 11, 1998.




K. WILLIAM CURTIS
Chief Counsel
Department of Personnel Administration

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PROPOSED DECISION

This matter was heard before Mary C. Bowman, Hearing Officer, Department of Personnel Administration (DPA) at 9:00 a.m. on May 14, 1998, at Sacramento, California.

Appellant was present without representation.

Respondent, California State Lottery Commission (the Lottery), was represented by Leslie A. Burgermyer, its Attorney.

Evidence having been received and duly considered, the Hearing Officer makes the following findings of fact and Proposed Decision.

I

JURISDICTION

Appellant's petition (appeal) to set aside her resignation complied with the procedural requirements of Government Code section 19996.1.

II

WORK HISTORY

Appellant began working for the Lottery on November 10, 1994. She was hired under the Limited Examination and Appointment Program (LEAP) and transitioned into a permanent full-time position. At the time of her resignation, appellant was an Information Systems Technician.

III

CAUSE FOR APPEAL

Appellant executed a written resignation on January 13, 1998. On February 12, 1998, she mailed an appeal to the Department of Personnel Administration claiming that she was forced to resign because of her disability, which is multiple sclerosis.

IV

CIRCUMSTANCES SURROUNDING APPELLANT'S RESIGNATION

On September 1, 1997, appellant was off work and commenced receiving Non-Industrial Disability (NDI) benefits through the Employment Development Department. Thereafter she also received Social Security Supplemental Income (SSI) benefits because of her disability. On December 29, 1997, appellant's physician, [REDACTED], M.D., M.P.H., provided the Personnel Officer of the Lottery a medical evaluation of appellant's condition and a prognosis of her return date. She stated,

"The above named patient, [REDACTED] has been diagnosed with multiple sclerosis which would account for her multiple absences from work. She continues to be disabled until March 1, 1998, until the neurologist can complete further evaluation. Your immediate attention to this matter is greatly appreciated. If you have any further questions, please feel free to call me at [REDACTED]"¹

¹ Appellant had previously provided respondent with medical documentation from [REDACTED] excusing her from work between October 13 and January 5, 1998. In the prior documentation, [REDACTED] also advised respondent, "I am willing to answer any questions regarding the patient's disease."

The Personnel Officer did not contact [REDACTED] for further information and did not send appellant for a medical examination or evaluation, pursuant to Government Code section 19235.5.²

Appellant remained off work. On January 6, 1998, respondent's Personnel Office sent her a letter and a packet of materials regarding benefit and leave options under the Family and Medical Leave Act (FLMA) and the State's program, the Moore, Brown Roberti California Family Rights Act (CFRA). According to the information provided, eligible employees are entitled to up to twelve weeks of leave and/or additional benefits under FMLA and CFRA.

On January 7, 1998, respondent's Personnel Office sent a second letter advising appellant as follows: "although we sympathize with your problem, we cannot approve such a request [a request for medical leave of absence] and, therefore, this is not an option at this time. " The letter went on to state:

" ...we determined that it would not be in the best interest of the Lottery to continue to hold a position open for you.

Since the CCSL [Lottery] cannot consider a request for a leave of absence, you have two options. You must either return to work no later than January 20, 1998 or resign from State service. If you choose to return to work, you must provide a doctor's release. If you chose to resign from your position, you must complete the enclosed form STD 687 and notify me of your decision in writing no later than Thursday, January 15, 1998. If you fail to do so, you will be considered Absent Without Leave (AWOL). Please be advised that AWOL, whether voluntary or involuntary, for five consecutive work days is an automatic resignation from State service pursuant to the provisions of Government Code section 19996.2."

Appellant was confused by the contradictory information provided her in the two letters. She also was upset that she was being directed to get a doctor's release and be back at work by

² Section 19235.5 provides an appointing power with authority to order the medical evaluation of an employee to determine whether the employee is able to perform the duties of her position or any other available position within the agency. It also provides authority for an employer to evaluate medical information provided and to terminate an employee who is determined not able to perform her job duties or the duties of any available position for which she is qualified.

([REDACTED] continued)

January 20 or resign. She knew her doctor would not release her and that respondent was aware of that. She mistakenly believed, based on respondent's letter, she had no choice but to resign.

Accordingly, on January 13, 1998, she executed the following resignation:

"In response to your request for my resignation due to my disability, I am forced to resign per your request. Enclosed are the forms you also requested."

Appellant mailed the resignation to the respondent's Personnel Office, as directed. In response, respondent separated appellant retroactively to October 10, 1997, instead of the effective date of the resignation. The result was that her federal and state benefits were also adversely impacted.

After appellant executed the resignation, she spoke with a representative of the Department of Rehabilitation and explained what had occurred. She was advised that she should not have resigned from her employment. She called the Multiple Sclerosis Society and a representative encouraged her to appeal.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE HEARING OFFICER MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Government Code section 19996.1 provides as follows:

"No resignation shall be set aside on the ground that it was given or obtained pursuant to or by reason of mistake, fraud, duress, undue influence or that for any other reason, it was not the free, voluntary and binding act of the person resigning . . ."

The clear language of the statute requires the Hearing Officer to look to the actions of the appellant at the time the appellant resigned to determine if that act was for any reason not free, voluntary and binding.

In this case, appellant reasonably relied on mistaken information provided by respondent as to her options. As a result, she mistakenly believed that she was required to resign. Respondent had a responsibility to comply with the provisions of the Government Code relating to medical evaluation and medical demotions/transfers and terminations.

Respondent acted inappropriately in demanding a resignation when appellant was medically unable to return to work. Respondent had a responsibility to either grant a medical leave of absence or otherwise comply with section 19235.5. Pursuant to section 19235.5,

[REDACTED] continued)

respondent should have either accepted the medical documentation provided by [REDACTED] as sufficient to determine appellant should be placed on a medical leave of absence or medically terminated or rejected the documentation as inconclusive and sent appellant for a medical evaluation to determine whether she was able to work in her position or another available position for which she qualified.

By forcing appellant to resign, respondent improperly relieved her of her future right to mandatory reinstatement should she become medically able to return to work. Additionally, respondent affected other benefits and rights by retroactively terminating her.

For the reasons set forth above, it is concluded that appellant proved that her resignation executed January 13, 1998, was given or obtained by mistake and /or undue influence by respondent's Personnel Office. Accordingly, it was not a free, voluntary and binding act on her part.

Further, it is concluded respondent should reinstate appellant to her position as an Information Systems Technician and place her on an approved medical leave of absence pending medical documentation³ as to her current ability to perform her job duties or those of another available position to which she may be transferred or demoted, pursuant to Government Code section 19235.5.

* * * * *

WHEREFORE IT IS DETERMINED that the resignation of [REDACTED] effective February 13, 1998, is hereby set aside, and she is restored to her position of Information Systems Technician with the Lottery. DPA reserves jurisdiction to determine the amount of back salary and benefits, if any, due appellant under the provisions of Government Code section 19996.1.

* * * * *

([REDACTED] continued)

The above constitutes my Proposed Decision in the above-entitled matter. I recommend its adoption by the Department of Personnel Administration as its decision in the case.

DATED: June 8, 1998

Mary C. Bowman

MARY C. BOWMAN

Hearing Officer

Department of Personnel Administration